BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

No. 08-34270

JAMEY LITTLE,

Appellee,

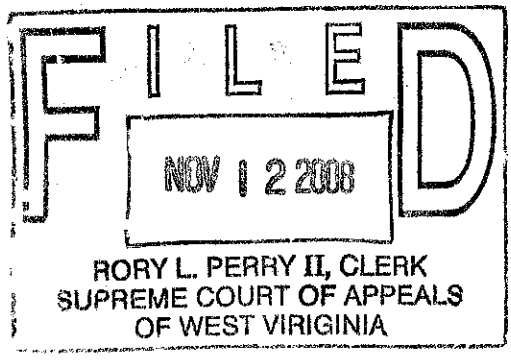
v.

WEST VIRGINIA ADJUTANT GENERAL,

Appellant.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLEE'S BRIEF



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APPELLEE'S BRIEF

I. PRIOR PROCEEDINGS, STATEMENT OF FACTS, AND STANDARD OF REVIEW

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

The certified question raised in this case requires this Court to answer the following public policy question:

> When W. Va. Code §15-1B-26, was adopted, requiring National Guard membership for firefighters and security guards employed by Appellant West Virginia Adjutant General, did the Legislature intend for these firefighters and security guards to be denied the most fundamental rights against discrimination afforded to all other employees in this State under the West Virginia Human Rights Act (WVHRA)?

The Honorable Judge Tod Kaufman provided two responses to this question. First, Judge Kaufman

further held that any firefighter or security guard, who was not employed by Appellant as of the date this statute was enacted, could not prevail in any claim under the WVHRA, if such firefighter or security guard was discharged for no longer being an active member of the National Guard. Second, Judge Kaufman held that Appellee Jamey Little, a very experienced firefighter employed by Appellant until he was discharged from the National Guard, had the right to pursue his disability discrimination claim against Appellant, based upon his view that Little was protected by a grandfather clause in W. Va. Code §15-1B-26.

While the potential damage award available to Little in this case is relatively small, the underlying issue raised is much larger than the actual money being sought. This case directly impacts those former firefighters and security guards, who are fired by Appellant after being discharged by the National Guard for reasons that are prohibited under the WVHRA. Little, who now volunteers his time counseling and assisting soldiers returning home from Iraq, Afghanistan, and other areas of active combat, believes this issue is of extreme importance to all veterans, who need to know whether or not they are entitled to the same protections under the WVHRA as all other State employees.

The facts in this case were stipulated by the parties and are repeated in Appellant's brief. Appellant also accurately recites the procedural history leading to this Court accepting the certified question, based upon the urging of both parties. The parties also are in agreement that the applicable standard of review is *de novo* for the rulings of law by Judge Kaufman. *See, e.g., Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 744, 559 S.E.2d 713, 717 (2001). However, Appellant and Little disagree over the correct answers to the certified question posed in this case.

II. CERTIFIED QUESTION

The certified question on appeal--which Appellant logically has broken down into two segments--reads as follows:

> In this case, Plaintiff was a firefighter employed by the Adjutant General and was a member of the National Guard when he was first hired. The National Guard later discharged Plaintiff based upon a mental disability. The Adjutant General then discharged Plaintiff as a firefighter, based upon W. Va. Code §15-1B-26, because he was no longer a member of the National Guard. Under these facts, [1] is the Adjutant General's reliance on W. Va. Code §15-1B-26, a complete defense to Plaintiff's claim that he was discriminated against by the Adjutant General in violation of the West Virginia Human Rights Act, [2] unless Plaintiff falls within the exception to the requirement of military membership in the "grandfather clause" contained in the statute?

In finding W. Va. Code § 15-1B-26 is a "complete defense" to a WVHRA claim, Judge Kaufman answered the first portion of the certified question affirmatively. With respect to the second portion of the certified question, however, Judge Kaufman concluded Little was protected by the grandfather clause in W. Va. Code § 15-1B-26.

III. ARGUMENT

A. THE PROTECTIONS OF THE MOST FUNDAMENTAL ANTI-DISCRIMINATION RIGHTS AFFORDED TO ALL OTHER EMPLOYEES IN THIS STATE UNDER THE POWERFUL WVHRA APPLY TO THOSE EMPLOYEES SUBJECT TO W. VA. CODE § 15-1B-26.

When the WVHRA was enacted, the Legislature clearly emphasized not only its intent to prohibit all forms of discrimination, but also to make the prevention of discrimination a top priority. *See* W. Va. Code § 5-11-1, *et seq.* In fact, eliminating discrimination was so important to the Legislature that in stating its intent, the Legislature found the denial of these fundamental rights "**is**

contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." (Emphasis added). W. Va. Code § 5-11-2.

There is no language in the WVHRA exempting Appellant's employees from being afforded all of the protections of the WVHRA. Furthermore, the Legislature did not include any language in W. Va. Code §15-1B-26, that explicitly extinguished Appellant's obligations not to discriminate against his employees.

When the Legislature wants to limit the rights of National Guard members, it knows how to do so. For example, in W. Va. Code § 15-1J-4(9), the Legislature recently excluded all employees of the newly created West Virginia Military Authority from using the grievance procedure afforded to other state employees. Thus, if the Legislature had intended for W. Va. Code § 15-1B-26, to be a complete defense to a claim filed under the WVHRA, the Legislature would have drafted such an exception to the application of the WVHRA in clear and unambiguous language.

If the Court were to find that W. Va. Code § 15-1B-26 excuses compliance with the WVHRA, it would be the first time an entire group of state employees was denied the protections mandated by the WVHRA. Indeed, Little has been unable to find any cases where a state statute, without explicitly saying so, has been read to allow discrimination against an employee on the grounds of a protected class. Appellant should not be permitted to assert that W. Va. Code § 15-1B-26, acts as a complete shield against any WVHRA claim asserted by firefighters or security guards. Indeed, the public policy problems with Appellant's position are readily apparent. Appellant contends that he advocated for the enactment of W. Va. Code § 15-1B-26 so that he "would not be forced to look into each individual's unique set of circumstances," and if he is required to comply with the WVHRA, then "he would then certainly be forced to look into the circumstances

surrounding each individual's military discharge . . . ." (Appellant's Br. at 13). Terminating employees without an individualized assessment into the employee's circumstances is not a policy that should be encouraged.[1]

Another consideration weighing in favor of giving WVHRA effect in cases involving individuals subject to W. Va. Code § 15-1B-26 is the long held principle of statutory interpretation that two statutes should be read in harmony whenever possible. *McKinney v. Fairchild, Inc.*, 199 W. Va. 718, 724, 487 S.E.2d 913, 919 (1997) (quoting Syllabus Point 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908)). This Court has explained, "[o]ne of our traditional rules of statutory interpretation requir[es] us to 'harmonize' a statute to effectuate the general purpose and design of the existing law . . . ." *Id.* Applying the harmonization principle to this case necessitates that this Court permit a WVHRA claim to proceed to trial, regardless of any potential defense afforded by asserted reliance on W. Va. Code § 15-1B-26.

In summary, there are at least six reasons that together counsel in favor of finding that the WVHRA applies to those employees subject to W. Va. Code § 15-1B-26. First and foremost, the WVHRA is a remedial statute with a long history and contains a strong statement of purpose regarding the Legislature's intent to ban discrimination. Second, both the WVHRA and § 15-1B-26 are silent on the interplay between the two statutes. Third, the Legislature knows how to limit the statutory rights of security guards and firefighters employed by Appellant. Fourth, the exempting of a category of State employees from protections of the WVHRA would be unprecedented. Fifth, the adoption of Appellant's understanding of the relationship of W. Va. Code § 15-1B-26, to

[1] While Little and his counsel have tremendous respect for Appellant and his career of public service, it does not change this fact nor condone his misconduct in this case.

WVHRA means individualized inquiries into adverse employment actions would never again be made by Appellant. Lastly, the harmonization principle requires that the Court give effect to both statutes at issue. As a result of these six reasons, the Court should not read the WVHRA as subservient to W. Va. Code § 15-1B-26. Instead, the Court should give effect to the Legislature's statement in W. Va. Code § 5-11-2, that denying protections under the WVHRA is "contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society" and hold that the WVHRA applies to security guards and firefighters who were formerly members of the National Guard.

To be clear, Little strongly disagrees with Judge Kaufman's conclusion that W. Va. Code § 15-1B-26, is an **complete defense** to a claim of discrimination filed under the WVHRA. However, Little recognizes that in defending against a discrimination claim under the WVHRA, Appellant is entitled to assert as a defense his reliance on W. Va. Code § 15-1B-26. A jury will have to decide if Appellant's reliance on this statute justifies his actions or whether Appellant, when he fired Little, did so knowing that Little had been discharged from the National Guard for a reason that is specifically prohibited by the WVHRA.

Juries, rather than courts, are charged with weighing the evidence and ferreting out whether Little was transferred based on his disability or pursuant to a permissible reason, in this case, the dictates of W. Va. Code § 15-1B-26. *See Skaggs v. Elk Run Coal, Co.*, 198 W. Va. 51, 72, 479 S.E.2d 561, 582 (1996). Thus, the final decision on whether or not Little should prevail must be left up to a jury to decide.

B. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE GRANDFATHER CLAUSE IN W. VA. CODE § 15-1B-26, SHOULD NOT BE READ SO NARROWLY AS TO PUNISH A NATIONAL GUARDSMEN FOR SERVICE TO HIS COUNTRY.

The Circuit Court's holding with respect to the grandfather clause is a correct textual reading and comports with logic, commonsense, fundamental fairness, a long held principle of statutory interpretation, and a subsequent statute on a similar topic.

The Circuit Court correctly held that, because he is protected by the grandfather clause, Little is exempted from any National Guard membership requirement that may otherwise arguably be required by W. Va. Code § 15-1B-26. The grandfather clause is the first proviso in the statute and states as follows:

> Provided, That any person **employed as a firefighter on the effective date of this section** who **is not a member of the West Virginia air national guard** may continue to be employed as a firefighter. (Emphasis added).

This proviso covers Little because he was a firefighter at the time this statute was adopted and, now, "is not a member of the West Virginia air national guard." The Legislature used the present tense "**is** not a member" rather than the past tense "**was** not a member" or "**has never been** a member."

The Circuit Court aptly stated the policy reasons that further counsel in favor of its reading of the grandfather clause.

> However, this [Circuit] Court further finds that any firefighter who was a member of the National Guard on the date this statute was enacted is protected by this grandfather clause. The assertion that a firefighter, who was a member of the National Guard at the time this statute was enacted, but who later is dismissed from the National Guard, somehow loses the benefit of this grandfather clause requires too narrow a reading of W. Va. Code § 15-1B-26. Such an

> interpretation would permit Defendant to keep firefighters, who have never been members of the National Guard, while firefighters, who actually were members of the National Guard for many years could be discharged, leaving those originally in the National Guard with less rights than others. The only logical reading of this grandfather clause is that it protects all persons who were firefighters in 2004, when the statute was enacted. . . . (Order, at 8)

Given that the statute is designed to **require** National Guard membership, it would be the height of irony to interpret it as denying Little the protections of the grandfather clause because he was, in fact, a member of the National Guard when the statute was enacted. Adopting Appellant's argument would have the undeniable effect of punishing a former member of the National Guard for his service to our country. The interpretation urged by Appellant would be fundamentally unfair to Little while serving no countervailing purpose.

In trying to convince the Circuit Court that the grandfather clause should be read very narrowly, Appellant claimed it only applies to two firefighters in Martinsburg, who were never members of the National Guard. If the grandfather clause was good enough to cover the two firefighters in Martinsburg, who were not members of the National Guard at the time W. Va. Code § 15-1B-26, was enacted in 2004, then it should be good enough to cover a firefighter who served his country in the National Guard, like Little.

A recent enactment further supports the Circuit Court's ruling on the meaning of the grandfather clause in W. Va. Code § 15-1B-26. In 2008, nearly four years after W. Va. Code § 15-1B-26, was adopted, the Legislature enacted W. Va. Code 15-1J-1, *et seq.* According to Appellant's brief, W. Va. Code § 15-1J-1, *et seq.*, "reiterates the requirements of W. Va. Code § 15-1B-26 for firefighters who are employed by the newly established West Virginia Military Authority administered by the Adjutant General's department." (Appellant's Br. at 18, n. 3). As Appellant has

suggested, it is logical to conclude that § 15-1J-5 was written with the grandfather clause in mind. Part of that enactment, W. Va. Code § 15-1J-5(c), provides,

> (c) Security guards and military firefighters **hired** by the authority under the provisions of this article will continue to have the same authority and must meet the requirements as set forth in section twenty-two, article one-b, chapter fifteen of this code and section twenty-six of said article.

W. Va. Code § 15-1J-5(c) (emphasis added). The use of the word, "hired," is quite significant here. Inasmuch as the Legislature did not use "working for" or "employed by," it can be inferred that the requirements in § 15-1B-26 regarding membership in the National Guard are to be read prospectively. That is, the new statute, § 15-1J-5(c), suggests that only those security guards and firefighters "hired" are subject to the requirement that they be National Guard members; whereas previous employees are "grandfathered in" under the protections of the first proviso in W. Va. Code § 15-1B-26. Reading § 15-1J-5(c) *in pari materia* with § 15-1B-26 supports the broader vision of the grandfather clause adopted by the Circuit Court.

Thus, based upon all of the foregoing, the Circuit Court was correct in concluding that Appellee is covered by the grandfather clause. If this Court agrees, the case ends there and the Court need not consider the arguments articulated in Part A.[2]

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[2] The policy arguments of the Appellant towards the end of his brief are hyperbole, bordering on the absurd. Allowing the Appellee to work as a firefighter and reasonably accommodate him in that job does not mean the National Guard will become an "entirely civilian force" or "jeopardize the retention of the 130th Airlift Wing . . . ." (Appellant's Br. at 18). Frankly, the suggestions are offensive to Little, who has served the National Guard honorably prior to his disability. They do not merit a further response.

IV. CONCLUSION

For the foregoing reasons, Appellee Jamey Little respectfully asks this Court answer the certified question as follows: (1) "No," Appellant's articulated reliance on W. Va. Code § 15-1B-26 is not a complete defense to Appellee's claim of disability discrimination under the WVHRA and (2) "Yes," Appellee does fall within the confines of the grandfather clause in W. Va. Code § 15-1B-26.

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CERTIFICATE OF SERVICE

I, Robert M. Bastress III, do hereby certify that a copy of the foregoing **APPELLEE'S BRIEF** was served on counsel of record on November 12, 2008, through the United States Postal Service, to the following:

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